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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 754

DARRELL V. BOYLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B, 38–52) is at 310 F. 2d 493.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1962 (Pet. App. B, 53). On December 19, 1962, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including January 18, 1963, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Congress has the constitutional power to prohibit engaging in the business of furnishing ships for compensation without a permit from the Interstate Commerce Commission.

STATUTES INVOLVED

The Interstate Commerce Act, Part III, Sec. 302 (e) (49 U.S.C. 902(e)):

> The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation * * * by water of passengers or property in interstate or foreign commerce for compensation.
>
> The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of "contract carrier by water". * * *

The Interstate Commerce Act, Part III, Sec. 309 (f) (49 U.S.C. 909(f)):

> Except as otherwise provided in this section and section 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation * * *.

The Interstate Commerce Act, Part III, Sec. 317 (a) (49 U.S.C. 917(a)):

> Any person who knowingly and willfully violates any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate or permit, for which no penalty is otherwise pro-

vided, shall be deemed guilty of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was in whole or in part committed shall be subject for each offense to a fine not exceeding $500. Each day of such violation shall constitute a separate offense.

STATEMENT

By information filed in the United States District Court for the Eastern District of Washington, petitioner was charged with engaging in the business of a contract carrier by water without first obtaining a permit from the Interstate Commerce Commission as required by the Interstate Commerce Act, Part III, *supra* (R. 5). It was stipulated that on April 27, May 5, and May 11, 1960, petitioner, for compensation, furnished a tug to a construction firm, which used the tug to tow the firm's construction equipment in interstate commerce (R. 8). Petitioner held no permit on any of these occasions; the proceedings requesting a permit (of which petitioner asks the Court to take official notice, Pet. 7, fn. 2) were not commenced by petitioner until August 11, 1960 (Interstate Commerce Commission Docket W-1147).

Petitioner moved to dismiss on the ground that the statute was unconstitutional (R. 6). The motion was denied (R. 9) and petitioner was adjudged guilty. A fine of $400 was imposed on the first count. Imposition of sentence was suspended on the remaining two counts, and petitioner was placed on probation for three years (R. 10). Upon appeal, the judgment was affirmed (Pet. App. B, 53).

ARGUMENT

Petitioner offers this litigation as a "test case" (Pet. 5) presenting important questions of "first impression" (Pet. 9). But the fact that the statute has been in operation twenty-two years without open attack upon its constitutionality shows that there are no serious constitutional questions. Nor is the case made a compelling vehicle to resolve those supposed issues merely because the offender has no defense on the undisputed facts and can defend only upon contentions concerning the law. In our view, the application of the vessel-furnisher provisions of the Interstate Commerce Act in the present context presents no difficult or novel questions of significance.

The purpose of the challenged provisions was early explained (*G. M. Cox Shipyard, Inc.*, 260 I.C.C. 20, 21):

> Regulation of applicant and other furnishers of vessels, as contemplated by section 302(e), results from their position in the national transportation system. They provide a pool of equipment from which other carriers draw during emergencies and peak-load periods. Unregulated use of this pool of equipment by shippers well might place them in the position of being able to use the charter market as leverage to enforce their demands for unreasonable rates and discriminatory service from common and contract carriers. * * *

Congress, at the time of enactment, deliberately rejected an amendment which would have excluded vessel-furnishers from regulation. 84 Cong. Rec. 9979; 86 Cong. Rec. 5858. As this Court said in

Barrett Line v. *United States*, 326 U.S. 179, 196, a case involving the grant of a "grandfather" permit to lease vessels under this Act:

> The obvious purpose was to secure full regulation of the traffic, by application of the Act's provisions to the lessee, if he should be a regulated carrier, thus exempting the lessor in that situation; otherwise to the lessor.

1. Petitioner broadly asserts that the lease of vessels "could not and does not directly or substantially affect interstate commerce" (Pet. 7). But he does not carry his burden in the face of a Congressional finding to the contrary. Instead, petitioner seizes upon the language of the Commission in the decision already quoted to the effect that the unregulated activity of vessel furnishers "might well" undermine the national transportation policy, and he contends that "there was no direct finding that this indubitably would happen" (Pet. 27). The short answer is that the Commission's restraint does not necessarily reflect doubt in the minds of the legislators. But, in any event, as the court of appeals below said (Pet. App. B, 47)—

> Due process does not require Congress to surrender foresight based on its judgment as to reasonable possibilities. Its sanctions do not demand that the legislative hand be stayed until an anticipated evil has become a reality or demonstrably inevitable.[1]

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[1] Petitioner's reliance upon the second *Champlin* decision of this Court (*United States* v. *Champlin Refining Company*, 341 U.S. 290) is misplaced. The Champlin Company was using its pipeline entirely for its own products and was not selling its

2. Petitioner next argues that the statute is impermissibly vague because it may or may not apply to the lessee who carries only exempt commodities in the leased vessel (Pet. 2–3, 8, 10–19). But no such issue is presented in this case where no claim is made that exempt commodities were transported by the lessees. See *Jeffrey Mfg. Co.* v. *Blagg*, 235 U.S. 571, 576.

In any event, there is no basis for petitioner's assertion that the industry is "in a quandary" concerning the interpretation of the statute (Pet. 10). In *Barrett Line* v. *United States*, *supra*, 326 U.S. 179, this Court indicated no difficulty in this respect, twice stating that a vessel-furnisher leasing to one carrying only exempt commodities does not require a permit (326 U.S. at 189, 194). As to the suggestion that the lessor of a vessel could not effectively protect himself against a lessee's use of the vessel without permission to transport non-exempt commodities, or that vessel-furnishers could vitiate the fair application of the statute by pleading unawareness of the non-exempt commodities transported by their lessees, such cases would merely pose factual issues of intent and wilfulness—problems with which courts must deal in many contexts. See *e.g.*, *United States* v. *Drum*, 368 U.S. 370, in which a purported private motor transportation practice was found to be, in fact, an activity subject to regulation.

Finally, petitioner challenges the legislation on the ground that similar regulation is not applied in areas which he assumes to be comparable. Thus, he

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use to others. Here, petitioner was leasing his vessel to others, thereby placing it in competition with regulated water carriers.

complains that a vessel furnisher is not prohibited from furnishing a vessel to a shipper in foreign commerce (Pet. 29); that a person with goods to ship can buy a vessel and ship without economic regulation (Pet. 9–10, 12–13, 30); and that a vessel furnisher is denied the right to lease his equipment "when other types of carriers are not so prohibited" (Pet. 8). The answer is, of course, that Congress may legislate with respect to one problem at a time. It may "hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent". *Hirabayashi* v. *United States,* 320 U.S. 81, 100. See also *United States* v. *Petrillo,* 332 U.S. 1, 8–9; *Currin* v. *Wallace,* 306 U.S. 1, 14.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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